ARTICLE 8. HEARSAY

Rule 801. Definitions That Apply to This Article; Exclusions from Hearsay.

(a) **Statement.** "Statement" means a person's oral assertion, written assertion, or nonverbal conduct, if the person intended it as an assertion.

(b) **Declarant.** "Declarant" means the person who made the statement.

(c) **Hearsay.** "Hearsay" means a statement that:

(1) the declarant does not make while testifying at the current trial or hearing; and

(2) a party offers in evidence to prove the truth of the matter asserted in the statement.

(d) **Statements That Are Not Hearsay.** A statement that meets the following conditions is not hearsay:

(1) *A Declarant-Witness's Prior Statement.* The declarant testifies and is subject to cross-examination about a prior statement, and the statement:

(A) is inconsistent with the declarant's testimony;

(B) is consistent with the declarant's testimony and is offered to rebut an express or implied charge that the declarant recently fabricated it or acted from a recent improper influence or motive in so testifying; or

(C) identifies a person as someone the declarant perceived earlier.

(2) *An Opposing Party's Statement.* The statement is offered against an opposing party and:

(A) was made by the party in an individual or representative capacity;

(B) is one the party manifested that it adopted or believed to be true;

(C) was made by a person whom the party authorized to make a statement on the subject;

(D) was made by the party's agent or employee on a matter within the scope of that relationship and while it existed; or

(E) was made by the party's coconspirator during and in furtherance of the conspiracy.

The statement must be considered but does not by itself establish the declarant's authority under (C); the existence or scope of the relationship under (D); or the existence of the conspiracy or participation in it under (E).

Comment to 2012 Amendment

The last sentence of Rule 801(d)(2) has been added to conform to Federal Rule of Evidence 801(d)(2). The amendment does not, however, include the requirement in Federal Rule of Evidence 801(d)(1)(A) that a prior inconsistent statement be "given under oath" to be considered as non-hearsay.

Otherwise, the language of Rule 801 has been amended to conform to the federal restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent in the restyling to change any result in any ruling on evidence admissibility.

Statements falling under the hearsay exclusion provided by Rule 801(d)(2) are no longer referred to as "admissions" in the title to the subdivision. The term "admissions" is confusing because not all statements covered by the exclusion are admissions in the colloquial sense—a statement can be within the exclusion even if it "admitted" nothing and was not against the party's interest when made. The term "admissions" also raises confusion in comparison with the Rule 804(b)(3) exception for declarations against interest. No change in application of the exclusion is intended.

Comment to Original 1977 Rule

Evidence which is admissible under the hearsay rules may be inadmissible under some other rule or principle. A notable example is the confrontation clause of the Constitution as applied to criminal cases. The definition of "hearsay" is a utilitarian one. The exceptions to the hearsay rule are based upon considerations of reliability, need, and experience. Like all other rules which favor the admission of evidence, the exceptions to the hearsay rule are counterbalanced by Rules 102 and 403.

Rule 801(d). This subsection of the rule has been modified and is consistent with the United States Supreme Court's version of the Rule and State v. Skinner, 110 Ariz. 135, 515 P.2d 880 (1973).

NOTE: On March 8, 2004, the United States Supreme Court decided *Crawford v. Washington,* 541 U.S. 36, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004), which greatly changed the law in determining whether admission of certain hearsay statements violated the confrontation clause. Cases decided prior to that date holding that admission of certain statements did not violate the confrontation clause therefore may no longer be good law.

Cases

801.003 The confrontation clause only applies only in a criminal proceeding.

In re Frankovitch, 211 Ariz. 370, 121 P.3d 1240, ¶ 16 (Ct. App. 2005) (jurors found Frankovitch to be sexually violent person; Frankovitch contended trial court's admission of his criminal history of arrests and convictions violated right to confrontation; court held that *Crawford* only applies in criminal cases, and because SVP proceeding is civil action, cases decided under confrontation clause did not apply).

801.004 The confrontation clause does not apply in a probation revocation proceeding.

State v. Carr, 216 Ariz. 444, 167 P.3d 131, ¶¶ 9–10 (Ct. App. 2007) (court rejected defendant's contention that admission of urinalysis report at probation revocation proceeding violated right to confrontation).

801.005 In order for an out-of-court statement to be considered "testimonial evidence," the declarant must have made the statement to an agent of the state.

State v. Hampton, 213 Ariz. 167, 140 P.3d 950, ¶¶ 45–50 & n.12 (2006) (at penalty phase, defendant's former girlfriend testified about several acts of violence that defendant committed; to extent girlfriend testified about what others had told her, that would not be testimonial evidence because she was not agent of state).

State v. Aguilar, 210 Ariz. 51, 107 P.3d 377, ¶¶ 9–11 (Ct. App. 2005) (in prosecution for murder, state sought to admit testimony by victim's son of excited utterance made by victim, and testimony by victim's wife's brother-in-law of excited utterance made by victim's wife; court held in-court testimony by lay witness of out-of-court excited utterances that lay witness heard was not "testimonial statement" that must satisfy Sixth Amendment).

* *State v. Tucker*, 231 Ariz. 125, 290 P.3d 1248, ¶ 48 n.15 (Ct. App. 2012) (defendant challenged admission of statements made by co-conspirators; court noted defendant did not explain why out-of-court statements about events prior to his involvement in conspiracy should be considered testimonial in nature).

801.007 The confrontation clause does not apply to use of rebuttal evidence offered during penalty phase of capital sentencing.

State v. McGill, 213 Ariz. 147, 140 P.3d 930, ¶¶ 45–52 (2006) (to rebut defendant's mitigation, state introduced hearsay statements made by victim of defendant's endangerment conviction and cell mate who said defendant asked him to kill potential witness; court rejected defendant's contention that admission of these hearsay statements violated confrontation clause).

801.009 If the defendant creates the circumstances that allow for the admissibility of a statement that would otherwise violate the right of confrontation, the defendant on essentially equitable grounds forfeits the protections of the confrontation clause.

Crawford v. Washington, 541 U.S. 36, 62, 124 S. Ct. 1354, 1370 (2004) (Court stated, "[T]he rule of forfeiture by wrongdoing (which we accept) extinguishes confrontation claims on essentially equitable grounds; it does not purport to be an alternative means of determining reliability.").

State v. Ellison, 213 Ariz. 116, 140 P.3d 899, ¶¶ 45–47 (2006) (court held that, if defendant introduced those parts of codefendant's statement that implicated codefendant and tended to exculpate defendant, state could inquire on cross-examination about those portions of codefendant's statement that implicated defendant, and introduction of those other portions would not implicate confrontation clause).

State v. Prasertphong, 210 Ariz. 496, 114 P.3d 828, ¶¶ 24–29 (2005) (defendant sought to introduce portion of codefendant's statement as statement against penal interest; court held state was then entitled to introduce those remaining portions of codefendant's statement under Rule 106 that were necessary to keep jurors from being misled, and that by introducing portions of codefendant's statement, defendant forfeited confrontation clause protection for remaining portions).

801.010 Admission of an out-of-court statement that is non-hearsay is not "testimonial evidence" and does not violate the confrontation clause of the United States Constitution.

Crawford v. Washington, 541 U.S. 36, 59, 124 S. Ct. 1354, 1369 n.9 (2004) (Court stated, "The [Confrontation] Clause also does not bar the use of testimonial statements for purposes other than establishing the truth of the matter asserted.").

State v. Womble, 225 Ariz. 91, 235 P.3d 244, ¶¶ 10–13 (2010) (detective testified that jail informant told him about defendant and that he used that information to get court order to listen to telephone calls; because detective testified only about defendant's existence and not about substance of what informant said, testimony did not violate Confrontation Clause).

State v. Boggs, 218 Ariz. 325, 185 P.3d 111, ¶¶ 29–36 (2008) (detective testified at trial that, during defendant's interrogation, he asked defendant about statements codefendant had made; defendant contended this violated his Sixth Amendment right of confrontation; court held that, because codefendant's statements were admitted not to prove truth of matters asserted, but were instead introduced to show context of interrogation, admission did not violate right of confrontation).

State v. Fischer, 219 Ariz. 408, 199 P.3d 663, ¶ 37 (Ct. App. 2008) (in prosecution stemming from plural marriage, defendant conceded statements were not "testimonial," thus admission of out-of-court statements did not violate defendant's right of confrontation).

State v. Tucker, 215 Ariz. 298, 160 P.3d 177, ¶¶ 52–62 (2007) (state's materials expert testified that duct tape used to gag victim was for industrial use, and testified that he based this opinion in part on conversations he had with manufacturer's sales representatives; because statements from sales representatives were offered to show basis for opinion and not to prove truth of matters asserted, admission of that evidence did not violate confrontation clause).

State v. Smith, 215 Ariz. 221, 159 P.3d 531, ¶¶ 21–26 (2007) (to prove especially heinous, cruel, or depraved aggravating circumstance, state presented testimony of medical examiner, who relied on findings and opinions of medical examiner from 1976; because findings and opinions of previous medical examiner were admitted merely to show basis for testifying medical examiner's opinion and not to prove truth of matters asserted, admission of that evidence did not violate confrontation clause).

State v. Roque, 213 Ariz. 193, 141 P.3d 368, ¶¶ 69–70 (2006) (in videotape of interrogation of defendant shown to jurors, detective told defendant his wife made statements to them incriminating him; because there was no evidence defendant's wife ever made these statements, detective's statement was offered merely to show interrogation technique and not for truth of matter asserted, and trial court instructed jurors this evidence was not offered for its truth; because evidence was not offered to prove truth of matter asserted, it was not hearsay and thus did not violate confrontation clause).

State v. Ellison, 213 Ariz. 116, 140 P.3d 899, ¶¶ 54–56 (2006) (trial court allowed detective to testify that, when codefendant spoke about defendant, his hands shook, his voice broke, and his eyes welled up as if about to cry; defendant contended this was inadmissible hearsay and violated confrontation clause; court stated there was no evidence showing codefendant intended these actions to be assertions, thus they did not violate confrontation clause).

State v. Ruggiero, 211 Ariz. 262, 120 P.3d 690, ¶¶ 14–22 (Ct. App. 2005) (defendant was charged with murder as result of shooting of 13-year-old daughter's 28-year-old boyfriend; defendant was allowed to introduce testimony from ex-girlfriend of one of defendant's friends (Soto) that Soto had said to her he killed boyfriend; trial court then allowed state to introduce testimony from police officer that Soto had told him that defendant had killed boyfriend; court noted second statement was not offered to prove truth of matter asserted and instead was offered only for impeachment of first statement, thus confrontation clause did not bar use of that statement).

801.020 For an out-of-court statement considered "testimonial evidence" to be admissible under the confrontation clause, there are two requirements : (1) the declarant must be unavailable, and (2) the defendant must have had a prior opportunity to cross-examine the declarant.

Crawford v. Washington, 541 U.S. 36, 68–69, 124 S. Ct. 1354, 1374 (2004) (Court overruled *Ohio v. Roberts,* 448 U.S. 56 (1980), which had held constitutional right of confrontation did not bar admission of unavailable witness's statement if statement bore "adequate indicia of reliability," which meant evidence that either fell within "firmly rooted hearsay exception" or bore "particularized guarantees of trustworthiness").

State v. Lehr, 227 Ariz. 140, 254 P.3d 379, ¶¶ 27–35 (2011) (at pretrial hearing before retrial, victim T.H. testified she would not testify against defendant because she opposed capital punishment; trial court threatened her with contempt, including jail for up to 6 months; T.H. said putting her in jail or fining her would not change her mind; court held trial court did not abuse discretion in finding T.H. was unavailable and allowing admission of her testimony from first trial).

State v. King, 213 Ariz. 632, 146 P.3d 1274, ¶¶ 2, 17 (Ct. App. 2006) (court held that records of prior convictions and MVD records were not testimonial evidence).

State v. Alvarez, 213 Ariz. 467, 143 P.3d 668, ¶¶ 10, 19–20 (Ct. App. 2006) (court held that, when deputy saw victim staggering and with blood over face and asked victim what happened, victim's statement in response was not testimonial evidence).

State v. Parks, 213 Ariz. 412, 142 P.3d 720, ¶¶ 1, 6–7 (Ct. App. 2006) (court held that, when officer questioned witness after emergency had passed and did so for purpose of gathering evidence, witness's statement was testimonial evidence, and admission of that statement without defendant's having opportunity to cross-examine violated defendant's right of confrontation).

State v. King, 212 Ariz. 372, 132 P.3d 311, ¶¶18, 33–35 (Ct. App. 2006) (court held that, when officer questioned witness after emergency had passed and did so for purpose of gathering evidence, witness's statement was testimonial evidence, and admission of that statement without defendant's having opportunity to cross-examine violated defendant's right of confrontation).

Bohsancurt v. Eisenberg, 212 Ariz. 182, 129 P.3d 471, ¶¶ 10, 35 (Ct. App. 2006) (court held that intoxilyzer quality assurance records are not testimonial evidence).

State v. Bronson, 204 Ariz. 321, 63 P.3d 1058, ¶¶ 15–28 (Ct. App. 2003) (court held accomplice confessions that implicate criminal defendants and are sought to be admitted under Rule 804(b)(3) are not within firmly-rooted exception; court further found insufficient indicia of reliability, thus court held admission of transcript of accomplice's interview conducted by defendant's attorney was error).

State v. Sullivan, 187 Ariz. 599, 931 P.2d 1109 (Ct. App. 1996) (statement of identity of person who caused injuries admissible under Rule 803(4)).

801.025 Whether a witness is considered "unavailable" for Sixth Amendment purposes is determined as a matter of constitutional law, and not as a matter of state evidentiary law.

State v. Real, 214 Ariz. 232, 150 P.3d 805, ¶ 11 (Ct. App. 2007) (officer administered FSTs to defendant and then took his statement; at trial, officer had no independent memory of investigation, so trial court allowed officer to read from his report; defendant contended officer was "unavailable" under Rule 804(a)(3); court held that, because officer was present and was subject to cross-examination, officer was available).

801.030 When a witness testifies and is subject to cross-examination, any statement that witness made is admissible and its admission does not violate the confrontation clause.

Crawford v. Washington, 541 U.S. 36, 59, 124 S. Ct. 1354, 1369 n.9 (2004) (Court stated, "[W]hen the declarant appears for cross-examination at trial, the confrontation clause places no constraints at all on the use of his prior testimonial statements.").

State v. Anderson, 210 Ariz. 327, 111 P.3d 369, ¶¶ 31–32 (2005) (because declarant did testify, there was no valid *Bruton* objection to use of her statements).

State v. Lopez, 217 Ariz. 433, 175 P.3d 682, ¶ 17 (Ct. App. 2008) (nurse testified about victim's description of attacker's physical contact with her, and about answers victim gave to questions included in sexual assault kit provided by TPD; because victim testified and was subject to cross-examination, there was no confrontation clause issue.

State v. Salazar, 216 Ariz. 316, 166 P.3d 107, ¶¶ 3–8 (Ct. App. 2007) (when victim testified she did not remember or could not recall, prosecutor played her tape recorded statement; because victim was present and subject to cross-examination; admission of her out-of-court statement did not violate confrontation clause).

State v. Real, 214 Ariz. 232, 150 P.3d 805, ¶¶ 2–9 (Ct. App. 2007) (officer administered FSTs to defendant and then took his statement; at trial, officer had no independent memory of investigation, so trial court allowed officer to read from his report; court held, because officer testified and was subject to cross-examination, admission of officer's testimony did not violate Sixth Amendment).

801.040 Statements made during police interrogation under circumstances objectively indicating the primary purpose of the interrogation was to enable police assistance to meet an ongoing emergency are not testimonial.

State v. Boggs, 218 Ariz. 325, 185 P.3d 111, ¶¶ 55–58 (2008) (officers arrived and spoke to victim, who was outside restaurant and had been shot twice; at trial, officers testified about victim's statements; court held victim's statements described what appeared to be ongoing emergency, thus they were non-testimonial).

State v. Alvarez, 213 Ariz. 467, 143 P.3d 668, ¶¶ 12, 18–19 (Ct. App. 2006) (officer found victim staggering down road with blood in hair and on face; officer asked victim what happened, and victim said three men had jumped him and had taken his car; victim died before trial; court held that, although victim gave answers in response to officer's question, primary purpose of question was to enable police assistance to meet an ongoing emergency and not to establish or prove past events for later criminal prosecution, thus victim's statement was not testimonial and admission did not violate confrontation clause).

State v. King, 212 Ariz. 372, 132 P.3d 311, ¶¶ 2–6, 29–32 (Ct. App. 2006) (declarant called 9-1-1 and requested that officers come to her house, said she had restraining order against defendant, who had just thrown two puppies over her house; when operator asked where defendant was, declarant said he "just drove off" and that she did not know where he was; in response to further questions, declarant identified defendant by name, date of birth, clothing, and race, and provided model and color of vehicle; court reversed conviction and stated that, on remand, trial court should consider which portions of 9-1-1 might be admissible and which parts might not be admissible).

801.050 Statements made during police interrogation under circumstances objectively indicating there is no ongoing emergency, and that the primary purpose is to establish or prove past events potentially relevant to later criminal prosecution are testimonial.

State v. Parks, 213 Ariz. 412, 142 P.3d 720, ¶¶ 4–7 (Ct. App. 2006) (police arrived after victim had been killed; after determining that defendant's son and brother had witnessed shooting, police separated and questioned them; because conduct showed police were operating in investigative mode, statements were testimonial, thus admission violated confrontation clause).

State v. King, 212 Ariz. 372, 132 P.3d 311, ¶¶ 2–6, 29–32 (Ct. App. 2006) (declarant called 9-1-1 and requested that officers come to her house, said she had restraining order against defendant, who had just thrown two puppies over her house; when operator asked where defendant was, declarant said he "just drove off" and that she did not know where he was; in response to further questions, declarant identified defendant by name, date of birth, clothing, and race, and provided model and color of vehicle; court reversed conviction and stated that, on remand, trial court should consider which portions of 9-1-1 might be admissible and which parts might not be admissible).

801.060 If the out-of-court statement is the functional equivalent of in-court testimony or was made under circumstances that the declarant would reasonably expect to be available at trial against a particular defendant, it will be considered a "testimonial statement" or "testimonial evidence" and thus will not be admissible unless (1) the declarant is unavailable, and (2) the defendant has had a prior opportunity to cross-examine the declarant.

State v. Parks, 211 Ariz. 19, 116 P.3d 631, ¶¶ 36–53 (Ct. App. 2005) (defendant's son witnessed actions that led to death of victim; officers arrived and one officer interviewed son, who was emotional at time; son died before trial; court held that son's statement qualified as excited utterance; court further held son's statement was "testimonial statement" because: (1) officer already knew defendant had killed victim when he interviewed son; (2) defendant had already been arrested; (3) there were no exigent safety, security, or medical concerns; (4) officer's questioning was not casual encounter; (5) officer separated son and other witness before questioning them; (6) officer was operating in investigative mode; (7) purpose of questioning was to obtain information about potential crime; and (8) son appeared to appreciate that what he had witnessed would have significance to future criminal prosecution; court held admission of son's statement violated defendant's confrontation clause rights), *aff'd,* 213 Ariz. 412, 142 P.3d 720, ¶ 8 (Ct. App. 2006).

801.070 If the out-of-court statement is not the functional equivalent of in-court testimony or was not made under circumstances that the declarant would reasonably expect to be available at trial against a particular defendant, it will not be considered a "testimonial statement" or "testimonial evidence" and thus its admissibility will be controlled by the rules governing hearsay statements.

* *State v. Shivers,* 230 Ariz. 91, 280 P.3d 635, ¶¶ 11–15 (Ct. App. 2012) (defendant charged with interfering with judicial process; defendant contended admission of written declaration of service of order of protection without testimony of officer who served it on him violated his Sixth Amendment rights; court concluded written declaration was non-testimonial because officer created it primarily for administrative purposes rather than prosecutorial purposes; mere possibility document might later be used in future prosecution did not render it testimonial).

State v. Damper, 223 Ariz. 572, 225 P.3d 1148, ¶¶ 7–13 (Ct. App. 2010) (throughout morning, defendant and girlfriend (C.) argued because C. did not want defendant to go to MLK Day event because she worried defendant's ex-girlfriend might be there and because she feared violence might break out at event; at 11:21 a.m., C's friend B. received text message from C's cell phone that said, "Can you come over; me and Marcus [defendant] are fighting and I have no gas"; shortly after that, defendant's roommate heard gunshot; defendant told roommate C. had been shot; at trial, defendant claimed shooting was accidental; at trial, trial court admitted text message; on appeal, defendant contended admission of text message violated his Sixth Amendment right of confrontation; because defendant did not object at trial, court reviewed for fundamental error only; because nothing indicated C. intended text message might later be used in prosecution or at trial, court concluded text message was not testimonial, thus no Sixth Amendment violation).

State v. Alvarez, 213 Ariz. 467, 143 P.3d 668, ¶¶ 16–17 (Ct. App. 2006) (officer found victim staggering down road with blood in hair and on face; officer asked victim what happened, and victim said three men had jumped him and had taken his car; victim died before trial; court held that, although victim gave answers in response to officer's question, there was nothing in record to suggest victim would have reasonably expected his statement to be used in a later criminal prosecution, thus statement was not testimonial and admission did not violate confrontation clause).

Bohsancurt v. Eisenberg, 212 Ariz. 182, 129 P.3d 471, ¶¶ 12–18, 31 (Ct. App. 2006) (because applicable regulations required that each Intoxilyzer 5000 undergo calibration checks every 31 days whether or not machine is used, and because person doing calibration and maintenance test on particular machine has no idea whether affidavit of results of those tests will ever be used against particular defendant, court held that affidavit of Crime Laboratory employee who conducted calibration and maintenance test on Intoxilyzer 5000 was not "testimonial evidence," thus admission of affidavit did not violate confrontation clause).

Bohsancurt v. Eisenberg, 212 Ariz. 182, 129 P.3d 471, ¶¶ 32–34 (Ct. App. 2006) (because affidavit contained no testimony against any particular person, mere fact that item in question was an affidavit does not make it "testimonial evidence").

State v. Aguilar, 210 Ariz. 51, 107 P.3d 377, ¶¶ 2–13 (Ct. App. 2005) (in prosecution for murder, state sought to admit testimony by victim's son of excited utterance made by victim, and testimony by victim's wife's brother-in-law of excited utterance made by victim's wife; court held in-court testimony by lay witness of out-of-court excited utterances that lay witness heard was not "testimonial statement" that must satisfy Sixth Amendment).

State v. Alvarez, 210 Ariz. 24, 107 P.3d 350, ¶¶ 18–22 (Ct. App. 2005) (officer found victim staggering down road with blood in hair and on face; officer asked victim what happened, and victim said three men had jumped him and had taken his car; victim died before trial; court held, although victim gave answers in response to officer's questions, this was not "police interrogation": victim did not call police, instead officer had found him; officer did not know crime had been committed, and instead questioned him about injuries in order to obtain medical help for him; questioning was neither structured nor conducted for purpose of producing evidence in anticipation of potential criminal prosecution, thus was not "testimonial statement"), *vac'd,* 213 Ariz. 467, 143 P.3d 668, ¶ 2 (Ct. App. 2006).

801.080 Whether the declarant would reasonably expect the statement to be available at trial against a particular defendant is a crucial element in determining whether the statement is "testimonial evidence."

State v. King, 212 Ariz. 372, 132 P.3d 311, ¶ 21 (Ct. App. 2006) ("a primary factor in determining if a hearsay statement is testimonial is whether 'a reasonable person in the position of the declarant would objectively foresee that his statement might be used in the investigation or prosecution of a crime'").

State v. Parks, 211 Ariz. 19, 116 P.3d 631, ¶ 36 (Ct. App. 2005) ("a statement may be testimonial under *Crawford* if the declarant would reasonably expect it to be used prosecutorially or if it was made under circumstances that would lead an objective witness reasonably to believe the statement would be available for use at a later trial"), *aff'd,* 213 Ariz. 412, 142 P.3d 720, ¶ 8 (Ct. App. 2006).

801.090 Whether the declarant would reasonably expect the statement to be available at trial against a particular defendant **is not** a crucial element in determining whether the statement is "testimonial evidence."

State v. King, 213 Ariz. 632, 146 P.3d 1274, ¶¶ 15–27 (Ct. App. 2006) (court held that records of prior convictions were public record, and that retention and production of such records was not type of evil that confrontation clause intended to avoid, thus record of prior convictions was not "testimonial evidence").

State v. Alvarez, 213 Ariz. 467, 143 P.3d 668, ¶ 15 (Ct. App. 2006) (court noted that, in *Davis v. Washington,* Court apparently shifted focus from motivation or reasonable expectations of declarant to primary purpose of interrogation).

Bohsancurt v. Eisenberg, 212 Ariz. 182, 129 P.3d 471, ¶¶ 28–31 (Ct. App. 2006) (court acknowledged that person doing calibration and maintenance test on Intoxilyzer 5000 and preparing affidavit of results would know that affidavit may be used in court, but noted that United States Supreme Court did not specifically emphasize any of its stated formulations as determinative of whether statement was "testimonial evidence," and thus concluded that knowledge of person preparing affidavit did not make affidavit "testimonial evidence").

801.100 The Confrontation Clause does not require that every person in the chain of custody be available to cross-examination, thus not everyone whose testimony might be relevant in establishing the chain of custody, authenticity of the sample, or accuracy of the testing device must appear in person.

State v. Gomez, 226 Ariz. 165, 244 P.3d 1163, ¶¶ 1–21 (2010) (DNA testing and analysis involved seven steps; during first six steps, technicians used machines to isolate and amplify DNA and generate profiles, but did not interpret data or draw conclusions, and those technicians did not testify; senior forensic analyst who was laboratory supervisor testified in detail about laboratory's operating procedures, standards, and safeguards, and although she did not witness all steps, she checked technicians' records for any deviations from laboratory's protocols, and then personally performed final step in process, interpretation and comparison, which was only step that required human analysis; that analyst then testified that several profiles derived from evidence at crime scene matched profile obtained from defendant's blood sample; court noted it was useful to separate testimony into two parts: (1) testimony about laboratory protocols and generation of DNA profiles and (2) expert opinion that profiles matched; court

assumed without deciding (1) machine-generated DNA profiles were hearsay statements and (2) although profiles were not admitted in evidence, senior analyst's testimony was functional equivalent of introduction of profiles in evidence; court held that chain of custody testimony did not violate Confrontation Clause simply because every technician who handled and processed samples did not testify, and that because defendant had opportunity to cross-examine senior analyst and question her about laboratory's procedures, technicians work, and machine-generated data, admission of senior analyst's testimony did not violate Confrontation Clause).

801.110 The Confrontation Clause does not apply to statements made by co-conspirators.

* *State v. Tucker*, 231 Ariz. 125, 290 P.3d 1248, ¶ 49 (Ct. App. 2012) (defendant challenged admission of statements made by co-conspirators; court noted there is no requirement that co-conspirator's statement satisfy the Confrontation Clause to be admissible).

801.200 A statement admitted in violation of the confrontation clause may be harmless error.

State v. Armstrong, 218 Ariz. 451, 189 P.3d 378, ¶¶ 31–34 (2008) (witness testified extensively at guilt phase of trial, but after remand for retrial of sentencing phase (before different jury), witness refused to testify, so trial court allowed state to present to jurors transcript of witness's testimony from guilt phase; court did not have to address whether admission of transcript was error because only way transcript could have affected verdict was in determination whether defendant committed multiple murders, and there was other evidence to establish that defendant committed multiple murders, so any error would have been harmless).

State v. Smith, 215 Ariz. 221, 159 P.3d 531, ¶¶ 32–33 (2007) (because detective's report was admissible as recorded recollection, and because statements of medical examiner contained in report were admissible as present sense impressions, report satisfied hearsay requirements; because jurors heard other evidence about manner in which victims died and wounds they suffered, even if admission of detective's report was error, any error was harmless).

Paragraph (a) — Statement.

801.a.005 In order to be considered a "statement," the words must contain an assertion; thus if the words do not contain an assertion, they are not considered to be a "statement," and by definition are not hearsay.

State v. Fischer, 219 Ariz. 408, 199 P.3d 663, ¶ 31 (Ct. App. 2008) (in prosecution stemming from plural marriage, witness was merely giving his observations about FLDS Church and what he saw occur; because he was not testifying about out-of-court declarations by third persons, his testimony was not hearsay).

801.a.010 If verbal or nonverbal conduct is not intended to be an assertion, by definition it is not hearsay, even if it is offered as evidence of the declarant's implicit belief of a fact.

State v. Ellison, 213 Ariz. 116, 140 P.3d 899, ¶¶ 54–56 (2006) (trial court allowed detective to testify that, when codefendant spoke about defendant, his hands shook, his voice broke, and his eyes welled up as if about to cry; defendant contended this was inadmissible hearsay and violated confrontation clause; court stated there was no evidence showing codefendant intended these actions to be assertions, thus they were not hearsay).

* *State v. Palmer,* 229 Ariz. 64, 270 P.3d 891, ¶¶ 4–10 (Ct. App. 2012) (hospital employee (B.C.) testified she found methamphetamine in backpack that had been transferred from ambulance that had brought defendant to hospital; on cross-examination, B.C. acknowledged backpack had not been inventoried along with defendant's other belongings and had been removed by two women who had come into defendant's trauma bay after B.C. found the methamphetamine; on re-direct, B.C. testified women asked defendant where is your backpack; defendant contended B.C.'s testimony about what women asked was hearsay; court held statement women made was not intended as assertion and thus was not hearsay, even though women acted as they did because of their belief in existence of condition sought to be proved, i.e., that backpack belonged to defendant).

State v. Chavez, 225 Ariz. 442, 239 P.3d 761, ¶¶ 6–10 (Ct. App. 2010) (in inventory search of defendant's vehicle, officers found drugs and two cell phones; on cell phones were text messages in which unidentified senders apparently sought to buy drugs from defendant; defendant contended these messages were hearsay; court held these messages were not offered to prove truth of matters asserted (that senders wanted to purchase drugs), and they were not assertions that defendant had drugs for sale; rather they were offered as circumstantial evidence that defendant had drugs for sale, and fact that they showed declarants thought defendant had drugs for sale did not make them assertions).

Paragraph (c) — Hearsay.

801.c.010 Hearsay is an oral, written, or non-verbal assertion, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.

State v. Tucker, 215 Ariz. 298, 160 P.3d 177, ¶¶ 45–50 (2007) (defendant contended written descriptions on some photographs in montage of 44 photographs showing corpses and autopsies were hearsay statements; because photographs and statements were not offered to prove truth of matters asserted, statements were not hearsay).

State v. Tucker, 215 Ariz. 298, 160 P.3d 177, ¶¶ 52–60 (2007) (state's materials expert testified that duct tape used to gag victim was for industrial use, and testified that he based this opinion in part on conversations he had with manufacturer's sales representatives; because statements from sales representatives were offered to show basis for opinion and not to prove truth of matters asserted, they were not hearsay).

State v. Smith, 215 Ariz. 221, 159 P.3d 531, ¶¶ 21–26 (2007) (to prove especially heinous, cruel, or depraved aggravating circumstance, state presented testimony of medical examiner, who relied on findings and opinions of medical examiner from 1976; because findings and opinions of previous medical examiner were admitted merely to show basis for testifying medical examiner's opinion and not to prove truth of matters asserted, statements were not hearsay).

State v. Pandeli, 200 Ariz. 365, 26 P.3d 1136, ¶ 19 (2001) (because defendant wanted to introduce confession to exculpate himself and thus for truth of matter asserted, confession was hearsay and not admissible unless it came under some exception).

State v. Dickens, 187 Ariz. 1, 926 P.2d 468 (1996) (detective's testimony he was unable to obtain any information from two different people was not hearsay because it did not relate any out-of-court statement, and because it was offered to show steps the detective had taken to investigate case and rebut defendant's claim that police were making him take the fall for someone else).

State v. Damper, 223 Ariz. 572, 225 P.3d 1148, ¶¶ 14–15 (Ct. App. 2010) (trial court admitted text message from victim's cell phone that said, "Can you come over; me and Marcus [defendant] are fighting and I have no gas"; because this was out-of-court statement offered to prove truth of matter asserted (that victim and defendant were fighting shortly before defendant shot victim), statement was hearsay).

State v. May, 210 Ariz. 452, 112 P.3d 39, ¶¶ 11–14 (Ct. App. 2005) (defendant charged with DUI with person under 15 in vehicle; officer testified that man had arrived at scene and said that he was defendant's brother and that person in vehicle was his 13-year-old son; court held that man's statement was offered to prove truth of matter asserted, and thus was hearsay).

Fuentes v. Fuentes, 209 Ariz. 51, 97 P.3d 876, ¶¶ 24–25 (Ct. App. 2004) (exhibit was copy of budget wife prepared for trial; because this budget of average anticipated monthly expenses was out-of-court statement offered to prove truth of matters asserted, it was hearsay, even though wife discussed budget while testifying; court concluded admission of exhibit did not prejudice husband because (1) wife testified and was subject to cross-examination, (2) information in exhibit was similar to affidavit of financial information that was admitted at trial, (3) admission of this type of evidence is fairly routine in dissolution proceedings, and (4) this was bench trial and court assumed trial court considered only competent evidence).

State v. Davis, 205 Ariz. 174, 68 P.3d 127, ¶ 29 (Ct. App. 2003) (in attempt to show someone else might have killed victim, defendant wanted to offer as exculpatory evidence witness's testimony that victim had told her she was pregnant with M.H.'s child; court held this was hearsay because it was offered for truth of matter asserted, and that is was not admissible as state of mind under Rule 803(3) or statement for medical purpose under Rule 803(4)).

Ogden v. J.M. Steel Erecting, Inc., 201 Ariz. 32, 31 P.3d 806, ¶¶ 36–37, 40 (Ct. App. 2001) (to prove driving record of driver who caused accident, plaintiffs presented driver's MVD record (listing three prior offenses) and police report of investigating officer, which contained supplement by another officer purporting to show driver's alleged driving record (listing 10 additional prior offenses); because plaintiffs offered supplement to prove driving record, supplement was hearsay; plaintiff cited only Rule 803(24) for admission of supplement).

Higgins v. Higgins, 194 Ariz. 266, 981 P.2d 134, ¶¶ 27–29 (Ct. App. 1999) (father's testimony of what his mother told him the children told her was double hearsay, and because neither level came under some hearsay exception, trial court should not have admitted testimony).

State v. Hernandez, 191 Ariz. 553, 959 P.2d 810, ¶ 8 (Ct. App. 1998) (20 minutes after killing victim, defendant called 9-1-1 and told operator that victim had attacked him with two broken bottles and so he shot victim in self-defense; court rejected defendant's claim that statement was not hearsay because he was offering it to rebut premeditation, and held it was offered to prove truth of matter asserted—that defendant acted in self-defense).

State v. Tinajero, 188 Ariz. 350, 935 P.2d 928 (Ct. App. 1997) (because what translator told officer was statement made out of court offered to prove truth of matter asserted, it was hearsay; court held it was admissible under catch-all exception). (**Note:** this probably could have been admissible under Rule 803(1), present sense impressions.)

State v. Geotis, 187 Ariz. 521, 930 P.2d 1324 (Ct. App. 1996) (officer testified he found cash, club, water pistol, and pager inside defendant's car; defendant claimed, because state did not offer item in evidence, testimony was hearsay; court found defendant's argument "frivolous").

State v. Dunlap, 187 Ariz. 441, 930 P.2d 518 (Ct. App. 1996) (because statement was offered to prove truth of matter asserted (Boles was investigating Marley) it was hearsay).

801.c.020 If the evidence is an out-of-court assertion, it is not hearsay if it is offered for a purpose other than to prove the truth of the matter asserted, but that other purpose still must be relevant.

State v. Dickens, 187 Ariz. 1, 926 P.2d 468 (1996) (detective's testimony that he was unable to obtain any information from two different people was not hearsay because it did not relate any out-of-court statement, and because it was offered to show steps the detective had taken to investigate case and rebut defendant's claim that police were making him take the fall for someone else).

State v. Fischer, 219 Ariz. 408, 199 P.3d 663, ¶ 35 (Ct. App. 2008) (in prosecution stemming from plural marriage, testimony about how church had taken action against witness by removing him from church was for purpose of determining whether witness had any bias against church and "prophet," and thus was not hearsay).

Crackel v. Allstate Ins. Co., 208 Ariz. 252, 92 P.3d 882, ¶¶ 59–64 (Ct. App. 2004) (trial court ordered parties to participate in settlement conference before Judge O'Neil; based on their conduct, Judge O'Neil found Allstate's employees had not participated in settlement conference in good faith, and ordered case to be tried on issue of damages only, at which point Allstate settled plaintiffs' claims; plaintiffs then sued Allstate for abuse of process, and sought to introduce Judge O'Neil's order sanctioning Allstate; court held sanction order was not hearsay because it was not offered to prove truth of matters asserted, but was instead offered to show effect it had on Allstate and its employees in settling plaintiffs' claims, and that this evidence was relevant on issue of punitive damages).

State v. Supinger, 190 Ariz. 326, 947 P.2d 900 (Ct. App. 1997) (officer's testimony that victim's mother said victim had been telling lies, had been sexually abused as a child, and had not been given sufficient counseling were not offered to prove truth of matters asserted, but were offered to support state's position that victim's recantation was false).

State v. Rivers, 190 Ariz. 56, 945 P.2d 367 (Ct. App. 1997) (testimony of parole officer that he called defendant's home and was told defendant was not there was admitted not to prove defendant was not home, but instead to explain why parole officer took steps he did).

State v. Dunlap, 187 Ariz. 441, 930 P.2d 518 (Ct. App. 1996) (because statement was not offered to prove truth of matter asserted (Boles was investigating Funk family) but was instead offered to show inadequacy of police investigation, it was not hearsay).

State v. McCoy, 187 Ariz. 223, 928 P.2d 647 (Ct. App. 1996) (because notes, letters, photographs, and "roll call," all with gang logos and insignia on them, not offered to prove truth of matters asserted in them, but to show knowledge and participation of possessor, they were not hearsay, and identity of their author was not relevant).

801.c.025 If the out-of-court statement is offered simply for the purpose of proving that the statement was made, then it is not an assertion and it is not hearsay.

State v. Fischer, 219 Ariz. 408, 199 P.3d 663, ¶ 33 (Ct. App. 2008) (in prosecution stemming from plural marriage, statement that "prophet" told witness that "the Lord wants to bless you with another lady" was not offered to prove truth of matter asserted and thus was not hearsay).

Penn-American Ins. v. Sanchez, 220 Ariz. 7, 202 P.3d 472, ¶¶ 36–39 & n.9 (Ct. App. 2008) (Inside Arizona (IA) arranged for Cusmir, independent owner-operator, to deliver goods to Tucson; on return trip, Cusmir was involved in accident that killed three people; Statutory Beneficiaries sued IA, who had $1,000,000 commercial general liability policy with Penn-American and $1,000,000 automobile insurance policy with NAICC; Penn-American at first defended without reservation of rights, and then 10 months into litigation, tendered defense to NAICC and issued reservation of rights letter to IA; IA later entered into *Morris* agreement with Statutory Beneficiaries wherein it stipulated to $4.3 million judgment and assigned to Statutory Beneficiaries any claims it might have against Penn-American; on motions for summary judgment, issue was whether 10 months was unreasonable delay and whether delay prejudiced IA; Statutory Beneficiaries contended IA was prejudiced because NAICC refused to commit to coverage; Penn-American contended Statutory Beneficiaries failed to produce any admissible evidence that NAICC had actually refused to commit to coverage; Statutory Beneficiaries relied on three letters authored by NAICC's counsel that they claimed were "evidence [of] NAICC's refusal to commit to coverage as a result of Penn-American's untimely reservation of rights," two of which described NAICC's concerns that it may be prejudiced by the "late notice situation"; Penn-American contended letters contained inadmissible hearsay; court held that letters were not offered to prove truth of matters asserted and were instead "verbal acts" and as such were properly before the trial court and constituted evidence of NAICC's position on coverage).

801.c.027 A statement made as a command is not hearsay if it is not intended as an assertion.

State v. Fischer, 219 Ariz. 408, 199 P.3d 663, ¶ 34 (Ct. App. 2008) (in prosecution stemming from plural marriage, statement that "prophet" "read some scriptures relative to multiply and replenish the earth" was command, not statement of fact, and thus was not hearsay).

801.c.030 If the out-of-court assertion is admitted for a purpose other than to prove the truth of the matter asserted, then its admission does not violate the right of confrontation.

State v. Boggs, 218 Ariz. 325, 185 P.3d 111, ¶¶ 29–36 (2008) (detective testified at trial that, during defendant's interrogation, he asked defendant about statements codefendant had made; defendant contended this violated his Sixth Amendment right of confrontation; court held that, because codefendant's statements were admitted not to prove truth of matters asserted, but were instead introduced to show context of interrogation, admission did not violate right of confrontation).

State v. Rogovich, 188 Ariz. 38, 932 P.2d 794 (1997) (because the out-of-court facts or data upon which expert relied were offered only to show basis for expert's opinion and not as substantive evidence, admission of this evidence did not violate defendant's right of confrontation).

State v. Larson, 222 Ariz. 341, 214 P.3d 429, ¶¶ 20–22 (Ct. App. 2009) (trial court admitted in evidence recorded portions of defendant's interrogation by police in which detective asserted defendant was guilty; defendant contended detective's statement was hearsay and should not have been admitted; court held that, because those portions were admitted to provide context for defendant's response and not to prove truth of matters asserted, detective's statements were not hearsay).

Paragraph (d)(1)(A)—Statements that are not hearsay: Prior inconsistent statement by witness.

801.d.1.A.010 A prior statement is admissible if it is inconsistent with trial testimony, based on the rationale that the jurors should be allowed to hear the conflicting statements and determine which story represents the truth in light of all the facts, such as the demeanor of the witness, the matters brought out in direct and cross-examination, and the testimony of others.

State v. Ortega, 220 Ariz.320, 206 P.3d 769, ¶¶ 30–33 (Ct. App. 2008) (victim's brother saw defendant molest victim; when called to testify, brother either did not remember his prior statements to police detective or denied making them; trial court properly allowed state to read to brother excerpts from his interview with police, whereupon he remembered telling detective that defendant threatened him if he told anyone what had happened).

State v. Mills, 196 Ariz. 269, 995 P.2d 705, ¶¶ 17–20 (Ct. App. 1999) (trial court allowed state to impeach witness with videotape of testimony from preliminary hearing).

State v. Miller, 187 Ariz. 254, 928 P.2d 678 (Ct. App. 1996) (trial court allowed admission of prior statements of co-defendant and two others who were there at the time).

801.d.1.A.020 The degree of contradiction determines whether a statement is inconsistent, but an inconsistent statement is not limited to one diametrically opposed to trial testimony.

State v. Rutledge (Sherman), 205 Ariz. 7, 66 P.3d 50, ¶¶ 14–25 (2003) (witness who testified at trial admitted making prior statement to police that was videotaped, and admitted all inconsistencies between trial testimony and videotaped interview, and offered explanations for those inconsistencies; defendant contended prior statements therefore were not inconsistent with trial testimony, and thus contended trial court abused discretion in admitting extrinsic evidence of prior statement (the videotape); court noted there were, in fact, several inconsistencies between witness's trial testimony and the videotaped interview, and that witness testified that he had lied to police because he was scared, had been threatened, and was intoxicated, and thus held videotape was admissible to allow jurors to assess witness's demeanor and credibility, and helped them decide which of witness's accounts to believe).

801.d.1.A.030 Failure of a witness to address a subject or state a fact in a prior statement under circumstances in which the witness naturally would have addressed that subject or stated that fact may be an inconsistency and may be subject for impeachment.

State v. Rutledge (Sherman), 205 Ariz. 7, 66 P.3d 50, ¶¶ 14–25 (2003) (witness who testified at trial admitted making prior statement to police that was videotaped, and admitted all inconsistencies between trial testimony and videotaped interview, and offered explanations for those inconsistencies; defendant contended prior statements therefore were not inconsistent with trial testimony, and thus contended trial court abused discretion in admitting extrinsic evidence of prior statement (the videotape); court noted there were, in fact, several inconsistencies between witness's trial testimony and videotaped interview, and that witness testified he had lied to police because he was scared, had been threatened, and was intoxicated, and thus held videotape was admissible to allow jurors to assess witness's demeanor and credibility, and helped them decide which of witness's accounts to believe).

801.d.1.A.035 Inconsistencies between trial testimony and prior statement go to the weight of the trial testimony, not its admissibility.

State v. Rivera, 210 Ariz. 188, 109 P.3d 83, ¶ 20 (2005) (plea agreements required witnesses to testify truthfully; defendant contended witnesses did not understand terms of plea agreements; court noted witnesses' statements indicated they understood they had to testify truthfully, and inconsistencies between trial testimony and prior statements went to weight of testimony, not admissibility).

State v. Ortega, 220 Ariz.320, 206 P.3d 769, ¶¶ 30–33 (Ct. App. 2008) (victim's brother saw defendant molest victim; when called to testify, brother either did not remember his prior statements to detective or denied making them; trial court properly allowed state to read to brother excerpts from his interview with police, whereupon he remembered telling detective defendant threatened him if he told anyone what had happened; court stated to extent defendant was contending brother's testimony was unreliable because it was inconsistent, that was issue of credibility for jurors to resolve).

801.d.1.A.070 If the witness cannot remember making a prior statement, the prior statement is admissible if the trial court determines the witness is feigning loss of memory, or if the trial court is not able to determine whether the witness is feigning loss of memory or if the loss of memory is real and record suggests reasons for witness to be evasive.

* *State v. Hausner,* 230 Ariz. 60, 280 P.3d 604, ¶¶ 55–61 (2012) (trial court did not find and record did not suggest person making statement feigned lack of memory, and because person was one of shooting victims, person would have no apparent reason to do so, thus trial court erred in concluding statement was prior inconsistent statement, but in light of other evidence, any error in admission of statement was harmless).

State v. King, 180 Ariz. 268, 275, 883 P.2d 1024, 1031 (1994) (once trial court concluded witness was feigning lack of memory, it allowed detective to testify about witness's prior statements).

State v. Robinson, 165 Ariz. 51, 58–59, 796 P.2d 853, 860–61 (1990) (witness told officers he saw Washington, Robinson, and Mathers together, and Washington was wearing bandana; at trial, witness testified that he could not recall whether it was Mathers and Robinson he saw together or Mathers and Washington, and did not recall who was wearing bandana; trial court allowed officer to testify about witness's prior statements; trial court stated it did not know whether witness was being evasive or was merely typical of many people with poor recollection; court held trial court did not abuse discretion when it permitted state to impeach witness with prior statement).

State v. Salazar, 216 Ariz. 316, 166 P.3d 107, ¶¶ 13–15 (Ct. App. 2007) (victim testified she did not remember or could not recall; prosecutor played her tape recorded statement; court stated trial court has considerable discretion in determining whether witness's evasive answers of lack of recollection may be considered inconsistent with witness's prior out-of-court statements, and that trial court did not abuse discretion in determining witness was feigning inability to recall her prior statements).

801.d.1.A.090 In determining under Rule 403 whether to admit a prior inconsistent statement, the trial court should consider, *inter alia:* (1) whether the witness being impeached admits or denies making impeaching statement and whether the witness being impeached is subject to any factors affecting reliability, such as age or mental capacity; (2) whether the witness presenting the

impeaching statement has an interest in the proceedings and whether there is any other evidence showing the witness made the impeaching statement; (3) whether the witness presenting impeaching statement is subject to any other factors affecting reliability, such as age or mental capacity; (4) whether the true purpose of the statement is to impeach witness or to serve as substantive evidence; and (5) whether there is any evidence of guilt other than the statement.

State v. Sucharew, 205 Ariz. 16, 66 P.3d 59, ¶¶ 19–23 (Ct. App. 2003) (state alleged defendant and D. were racing when defendant's vehicle hit and killed victim; state granted D. immunity to obtain his testimony; D. initially testified he did not know how fast he was going and he never drove side-by side with defendant's car; he later admitted telling officer he was going 60 m.p.h.; officer then testified, over defendant's objection, that D. told him he was going 80 m.p.h. and was "kind of" racing defendant; court stated only fourth factor (substantive use rather than impeachment) militated against admission of prior inconsistent statement, and because there was other evidence of defendant's guilt, held trial court did not abuse discretion in admitting evidence of prior inconsistent statement).

State v. Miller, 187 Ariz. 254, 928 P.2d 678 (Ct. App. 1996) (for five *Allred* factors, (1) three witnesses denied making statements, (2) impeaching witnesses had no interest in proceedings and three statements corroborated each other, (3) there were no factors affecting reliability of impeaching witnesses, (4) true purpose of admission was to establish guilt, and (5) impeaching statements were only evidence of guilt; even though three of five factors were in favor of exclusion, because statements corroborated each other, court concluded trial court did not err in admitting them).

801.d.1.A.100 A police officer is not "interested" merely because of involvement in the criminal investigation, and is "interested" only if the officer has some personal connection with the participants or personal stake in the outcome of the case.

State v. Sucharew, 205 Ariz. 16, 66 P.3d 59, ¶ 22 (Ct. App. 2003) (court rejected defendant's contention that officer testifying had interest in proceedings by citing *State v. Miller* and not discussing issue further).

State v. Miller, 187 Ariz. 254, 928 P.2d 678 (Ct. App. 1996) (there was no showing that any of the three officers who took prior statements had any personal interest in case).

801.d.1.A.110 A prior inconsistent statement may be considered as substantive evidence as well as used for impeachment purposes.

State v. Huerstel, 206 Ariz. 93, 75 P.3d 698, ¶ 42 n.9 (2003) (defendant's witnesses testified that codefendant told them he shot all three victims; trial court then allowed state to introduce codefendant's statement to police in which he claimed defendant shot all three victims; court held admission of codefendant's statement to police violated confrontation clause, thus trial court erred in admitting it; court noted that use of prior inconsistent statement as substantive evidence is predicated on fact that witness who made statement testifies at trial and thus is subject to cross-examination, but when prior inconsistent statement is admitted under Rule 806, declarant has not testified at trial and thus is not subject to cross-examination, so only way statement could be used is for impeachment and not as substantive evidence).

State v. Acree, 121 Ariz. 94, 97, 588 P.2d 836, 839 (1978) (when police interviewed victim 2 days after assault, she said defendant pointed gun at her and had tried to shoot her; at trial, victim testified that defendant never pointed gun at her, that she did not believe defendant would have

shot or harmed her, and that she could have blown entire matter out of proportion; state was then allowed to impeach victim's trial testimony with statement she made during police interview; defendant contended that trial court erred in allowing use of prior inconsistent statements for substantive purposes; court held evidence was admissible for substantive purposes).

State v. Mills, 196 Ariz. 269, 995 P.2d 705, ¶ 21 (Ct. App. 1999) (trial court allowed state to impeach witness with videotape of testimony from preliminary hearing; court rejected defendant's claim that statement should not have been admitted because jurors might have used it as substantive evidence).

801.d.1.A.120 The trial court is not required to instruct the jurors that a prior inconsistent statement may be considered as substantive evidence if the trial court instructs the jurors that they are to determine the facts and assess the credibility of the witnesses.

State v. Nordstrom, 200 Ariz. 229, 25 P.3d 717, ¶ 83 (2001) (trial court did not abuse discretion in refusing to instruct jurors they could consider prior inconsistent statement both for impeachment and as substantive evidence).

Paragraph (d)(1)(B)—Statements that are not hearsay: Prior consistent statement by witness.

801.d.1.B.010 A prior consistent statement is admissible to rebut an express or implied charge of recent fabrication or improper influence or motive.

State v. Jones, 197 Ariz. 290, 4 P.3d 345, ¶¶ 13–18 (2000) (defendant implied that two witnesses had motives to fabricate because state gave them plea bargains, and third witness had motive to fabricate because he, rather than defendant, was responsible for killings).

State v. Trani, 200 Ariz. 383, 26 P.3d 1154, ¶¶ 3, 13 (Ct. App. 2001) (on cross-examination, defendant's attorney asked witness about several violations of her plea agreement, implying that witness had fabricated testimony to retain benefits of plea agreement; state properly permitted to read consistent statement witness made before entering into plea agreement).

Sheppard v. Crow-Baker-Paul No. 1, 192 Ariz. 539, 968 P.2d 612, ¶ 34 (Ct. App. 1998) (because defendant both in cross-examining plaintiff and in final argument sought to persuade jurors that plaintiff was misrepresenting how injury occurred, statement was admissible as prior consistent statement).

801.d.1.B.030 Cross-examination can trigger the use of a prior consistent statement.

State v. Trani, 200 Ariz. 383, 26 P.3d 1154, ¶¶ 3, 13 (Ct. App. 2001) (on cross-examination, defendant's attorney asked witness about several violations of her plea agreement, implying that witness had fabricated testimony to retain benefits of plea agreement; state properly permitted to read consistent statement witness made before entering into plea agreement).

801.d.1.B.040 To be admissible, a prior consistent statement must have been made prior to the time the motive to fabricate arose or the improper influence was applied.

State v. Hoskins, 199 Ariz. 127, 14 P.3d 977, ¶¶ 65–67 (2001) (detective testified about statements witness made to him about defendant's wanting to commit car-jacking and kill victim; although defendant had claimed witness was biased and had motive to fabricate, court concluded that bias and motive to fabricate arose prior to time witness made statements to detective, but

held that, even if testimony was improperly admitted, any error was harmless because witness testified and told jurors same things that detective told them).

State v. Jones, 197 Ariz. 290, 4 P.3d 345, ¶¶ 13–18 (2000) (defendant implied that two witnesses had motives to fabricate because state gave them plea bargains; because those witnesses made statements prior to time state offered plea bargains, prior statements were admissible; defendant implied third witness had motive to fabricate because he, rather than defendant, was responsible for killings; because motive to fabricate would have arisen at time of killing, statement was made after motive arose, thus trial court erred in admitting prior statement, but any error was harmless).

Sheppard v. Crow-Baker-Paul No. 1, 192 Ariz. 539, 968 P.2d 612, ¶ 35 (Ct. App. 1998) (because defendant did not raise claim at trial that prior consistent statement was not made prior to time motive to fabricate arose, defendant waived this claim on appeal).

State v. Tinajero, 188 Ariz. 350, 935 P.2d 928 (Ct. App. 1997) (because trial court could have concluded that defendant's motive to fabricate arose once he was arrested, trial court properly excluded prior consistent statement defendant made after being arrested).

State v. Jones, 188 Ariz. 534, 937 P.2d 1182 (Ct. App. 1996) (because victim made statements prior to being placed in juvenile detention, which defendant claimed gave her motive to fabricate, trial court properly admitted statements consistent with victim's trial testimony).

Paragraph (d)(2)(A) —Statements that are not hearsay: Party-opponent's own admission.

801.d.2.A.005 A party's statement is admissible.

State v. Cruz, 218 Ariz. 149, 181 P.3d 196, ¶¶ 5, 50–51 (2008) (officers were chasing defendant; when officer saw defendant and drew his gun, defendant said, "Just do it. . . . Just go ahead and kill me now. Kill me now. Just get it over with"; court held defendant's statement qualified as party admission and thus was admissible).

Picaso v. Tucson Unif. S.D., 217 Ariz. 178, 171 P.3d 1219, ¶ 7 (2007) (plaintiff's guilty plea in criminal case was admissible in civil case).

* *Cal X-tra v. W.V.S.V. Holdings,* 229 Ariz. 377, 276 P.3d 11, ¶¶ 55–57 (Ct. App. 2012) (in support of plaintiffs' motion for summary judgment, plaintiffs included deposition from one plaintiff [Beus] stating what Sara Taylor Hickey [Taylor] told him about source of computer disk that had on it damaging information; because Taylor was married to a defendant [Hickey] at time of her statement to Beus and was a defendant in litigation, her statement was admissible as statement of party opponent).

801.d.2.A.010 A party's statement does not have to be against the party's interest, thus any statement of a party is admissible as long as it is relevant.

State v. Nordstrom, 200 Ariz. 229, 25 P.3d 717, ¶¶ 50, 55 (2001) (because defendant's letter and statement to third person were defendant's own statements, they were not hearsay).

State v. Bocharski, 200 Ariz. 50, 22 P.3d 43, ¶¶ 37–39 (2001) (while in jail, defendant allegedly assaulted fellow inmate; trial court admitted by stipulation inmate's statement of what defendant said during assault; court noted this was statement of a party, thus not hearsay, but held statement, "If it were up to me, you would be dead right now," had no relevance, thus it was error to admit statement, but any error was harmless in light of other evidence).

801.d.2.A.025 A party's factual allegations in a civil complaint are evidentiary admissions and may be introduced against the party.

Henry v. Healthpartners of Southern Ariz., 203 Ariz. 393, 55 P.3d 87, ¶¶ 6–9 (Ct. App. 2002) (medical malpractice action resulting from patient's death from cancer was filed against decedent's doctor, radiologist employed by medical center, and medical center (TMC/HSA); plaintiff settled with doctors and went to trial against TMC/HSA; TMC/HSA named doctors as non-parties at fault; plaintiff's trial strategy was to minimize radiologist's fault in order to place more of blame on TMC/HSA; court held plaintiff's factual allegations contained in complaint delineating radiologist's negligence were relevant and admissible against plaintiff).

801.d.2.A.045 Because a statement under this rule is an admission by a party opponent, there is no requirement that it be independently corroborated.

State v. Garza, 216 Ariz. 56, 163 P.3d 1006, ¶ 41 (2007) (in telephone call from jail, when asked why he was arrested, defendant stated, "Well, remember what you wanted me to do when that one guy beat you up, well I did it to someone else"; court rejected defendant's contention that statement's trustworthiness had to be independently corroborated).

801.d.2.A.050 To be admissible, the statement must be offered against a party, thus a criminal defendant's prior exculpatory statement, offered by the defendant and not by the party-opponent, is hearsay and not admissible.

State v. Wooten, 193 Ariz. 357, 972 P.2d 993, ¶¶ 46–47 (Ct. App. 1998) (trial court properly precluded defendant from offering own statement denying responsibility for killing).

801.d.2.A.060 The *corpus delicti* doctrine ensures a defendant's conviction is not based upon an uncorroborated confession or incriminating statement, thus the state must show (1) a certain result has been produced, and (2) the result was caused by criminal agency rather than by accident or some other non-criminal action; only a reasonable inference of the *corpus delicti* need exist before the jurors may consider an incriminating statement, and circumstantial evidence may support such an inference; furthermore, the state need not present evidence supporting the inference of *corpus delicti* before it submits the defendant's statement as long as the state ultimately submits adequate proof of the corpus delicti before it rests.

State v. Chappell, 225 Ariz. 229, 236 P.3d 1176, ¶¶ 8–10 (2010) (2-year-old victim died by drowning in swimming pool; defendant did not object at trial to admission of his statements, but claimed on appeal his statements about murder should have been excluded because state failed to proved *corpus delicti*; because defendant did not object to admission of his statements at trial, court reviewed for fundamental error only; court held following evidence corroborated defendant's statements: Several days before victim's death, defendant was seen inspecting swimming pool area at apartment complex where victim and his mother lived; rock similar to rocks found near defendant's parents' house was used to prop open pool gate; mother routinely locked apartment door at night, making it unlikely victim could have opened door himself; at one time, defendant had key to mother's apartment; and victim's body was found in pre-dawn hours in pool located some distance from mother's apartment; court held this corroborating evidence made it very unlikely victim's death was accident; court found no error, fundamental or otherwise).

State v. Morris, 215 Ariz. 324, 160 P.3d 203, ¶¶ 33–35 (2007) (defendant contended state presented insufficient evidence of *corpus delicti* for deaths of victims; court held following evidence established *corpus delicti*: bodies were found naked in alley; drag marks indicated they had been moved to alley; DNA on clothing in defendant's camper matched DNA of bodies; one body had defendant's DNA under her fingernails; hair extensions found in defendant's camper were similar to hair extensions of one body; and defendant possessed identification cards from one body when arrested).

State v. Hall, 204 Ariz. 442, 65 P.3d 90, ¶¶ 43–47 (2003) (at close of state's case, defendant moved for judgment of acquittal, arguing state failed to establish *corpus delicti* of crimes charged; court held that, even though state never found body of victim, state presented evidence victim was missing and circumstantial evidence that victim met with foul play, and evidence of others using victim's property was sufficient for jurors to conclude victim was dead and that death resulted from criminal conduct).

State v. Scott, 177 Ariz. 131, 142–43, 865 P.2d 792, 803–04 (1993) (stated that, before uncorroborated confession is admissible as evidence of crime, state must establish *corpus delicti* by proving (1) certain result has been produced and (2) that someone is criminally responsible for that result, but only reasonable inference of *corpus delicti* need exist before confession may be considered, but held *corpus delicti* doctrine did not apply at sentencing stage).

State v. Atwood, 171 Ariz. 576, 598, 832 P.2d 593, 615 (1992) (court held pre-offense statements do not require corroboration because they do not contain inherent weaknesses of admissions made after fact; court noted, however, circumstances of child's disappearance, expert testimony about paint and nickel transfers between defendant's car and victim's bicycle, and testimony placing defendant in neighborhood and with a young child provided *corpus delicti* for kidnapping).

State v. Atwood, 171 Ariz. 576, 598–99, 832 P.2d 593, 615–16 (1992) (defendant contended state failed to establish *corpus delicti* for murder and thus his murder conviction was invalid; court held evidence that 8-year-old girl disappeared from neighborhood and was found dead in desert several miles from home, that defendant was a known pedophile and was within yards of girl seconds before she vanished, that defendant was with young girl in his car, and that he later had blood on his hands and his clothing and cactus needles in his arms and legs provided *corpus delicti* for murder, thus jurors properly could consider defendant's admissions).

State v. Gillies, 135 Ariz. 500, 505–06, 662 P.2d 1007, 1012–13 (1983) (at close of stat's case, defendant made motion for judgment of acquittal on ground state failed to present sufficient evidence to establish *corpus delicti* of sexual assault; court held evidence established *corpus delicti*: victim was found not wearing panties, panties were discovered in area where victim was allegedly raped, and girlfriend testified that victim normally wore panties; victim's shoe was pushed inside leg of pantyhose in manner suggestive of violence; medical examiner discovered seminal fluid in victim's vagina; and foreign pubic hairs were found in victim's pubic area, thus trial court did not err in denying defendant's motion for judgment of acquittal).

State v. Gerlaugh, 134 Ariz. 164, 169–70, 654 P.2d 800, 805–06 (1982) (defendant contended trial court erred in denying motion for judgment of acquittal based on claim that state did not establish *corpus delicti* for eith kidnapping and armed robbery; court held following evidence established *corpus delicti*: defendant and codefendant both confessed and each indicated kidnapping, armed robbery, and murder had taken place; mutilated body of victim was found in field far

from his home and car; condition of body was consistent with activities described in confessions; court noted corroboration points to veracity of confessions, which is purpose of *corpus delicti* requirement).

State v. Sarullo, 219 Ariz. 431, 199 P.3d 686, ¶¶ 6–10 (Ct. App. 2008) (defendant was victim's ex-boyfriend; victim kept gun unloaded on closet shelf; on 8/25, victim awoke at night and saw defendant standing in her bedroom; defendant walked over to victim, pointed gun at her, and threatened her; after defendant put down gun and left, victim saw it was her gun and it was loaded; after being arrested, defendant told police he had entered victim's home 8/24 and took gun; defendant contended there was no *corpus delicti* for burglary and theft for entering and taking gun on 8/24; court stated that, although there was no evidence, apart from defendant's confession, of 8/24 burglary and theft, there was uncontradicted evidence of 8/25 burglary and aggravated assault, thus there was independent evidence of "closely related" crimes; moreover, defendant had told victim that he had entered her home 8/24 and had taken her gun, and gun was unloaded when taken and loaded when recovered; court concluded defendant's confession was sufficiently corroborated and that evidence supported reasonable inference he committed 8/24 offenses).

State v. Barragan-Sierra, 219 Ariz. 276, 196 P.3d 879, ¶¶ 11–15 (Ct. App. 2008) (defendant was convicted of conspiracy to commit human smuggling; court held following evidence supported reasonable inference that defendant committed offense: (1) when officers tried to stop truck, it sped off reaching speeds in excess of 100 mph; (2) once truck stopped, driver and three other persons fled into nearby cornfield and were not found; (3) defendant was found with four other persons hiding under piece of carpet in bed of truck; (4) defendant appeared tired and his clothes were soiled; and (5) federal documents showed defendant was not in country legally).

State v. Morgan, 204 Ariz. 166, 61 P.3d 460, ¶¶ 17–23 (Ct. App. 2002) (defendant was charged with two counts of sexual conduct with minor based on oral sexual conduct, one count of child molestation for touching victim's genitals with his hand, and one count of sexual assault for engaging in sexual intercourse with victim without her consent; defendant confessed that he engaged in oral sexual contact with victim; neither victim nor any other witness testified about any oral sexual contact; defendant contended there was no *corpus delicti* for sexual conduct counts; although there was no independent evidence of oral sexual contact, following evidence was presented about other offenses: victim testified that defendant touched her between legs and had forceful sexual intercourse with her, and witness saw defendant and victim in back seat of car, both naked from waist down, and with victim straddling defendant; court held that, even though there was no independent evidence of oral sexual contact, there was evidence to support the other charged offenses, which were closely related, and this supported a reasonable inference the oral sexual conduct had occurred).

State v. Morgan, 204 Ariz. 166, 61 P.3d 460, ¶ 24 (Ct. App. 2002) (defendant was charged with sexual conduct with minor based on oral sexual conduct, child molestation for touching victim's genitals with his hand, and sexual assault for engaging in sexual intercourse with victim without her consent; defendant contended there was no *corpus delicti* for child molestation; court noted victim testified that defendant touched her between legs, which court held was sufficient independent evidence of child molestation).

State ex rel. McDougall v. Superior Ct. (Plummer), 188 Ariz. 147, 933 P.2d 1215 (Ct. App. 1996) (evidence showed vehicle was being driven improperly and occupants in it were intoxicated, and husband said wife was driving; this established *corpus delicti* for charge against wife).

801.d.2.A.061 If the state fails to produce sufficient evidence to establish *corpus delicti,* the jurors sould not consider the defendant's statement, and if evidence other than defendant's statement is not sufficient to establish the element of the offense, the trial court should grant a motion for judgment of acquittal.

State v. Nieves, 207 Ariz. 438, 87 P.3d 851, ¶¶ 6–26 (Ct. App. 2004) (defendant said she placed her hand over mouth of 10-month-old daughter until she stopped breathing; court concluded body of victim and unexplained death were not sufficient to establish *corpus delicti* of crime).

State v. Flores, 202 Ariz. 221, 42 P.3d 1186, ¶¶ 4–19 (Ct. App. 2002) (defendant was found with two small rocks of crack cocaine, and when questioned, told officers he was holding drugs for third person, who would tell him to whom to deliver the drugs; state charged defendant with possession for sale; because only evidence of sale was defendant's statement, there was no *corpus delicti* for crime of possession for sale, trial court properly suppressed defendant's statement).

801.d.2.A.062 Because the purpose of a preliminary hearing is to determine whether probable cause exists that the person charged committed the offense, the doctrine of *corpus delicti* does not apply at a preliminary hearing

State v. Jones (Roche), 198 Ariz. 18, 6 P.3d 323, ¶¶ 7, 15–18 (Ct. App. 2000) (trial court applied *corpus delicti* rule, excluded defendant's statement, held there otherwise was not sufficient evidence to show probable cause, and granted motion for new determination of probable cause; court held trial court erred in concluding that *corpus delicti* rule applied at preliminary hearing).

801.d.2.A.063 Because the *corpus delicti* rule applies only to extra-judicial statements, it does not apply to a defendant's in-court statement establishing the factual basis for a guilty plea.

State v. Rubiano, 214 Ariz. 184, 150 P.3d 271, ¶¶ 1, 10 (Ct. App. 2008) (court rejected defendant's claim his guilty plea was insufficient because there was no evidence of *corpus delicti* independent of his admission at change-of-plea proceeding).

801.d.2.A.065 Because the *corpus delicti* rule applies only to extra-judicial statements, it does not apply to a defendant's testimony in court.

State v. Rubiano, 214 Ariz. 184, 150 P.3d 271, ¶ 10 (Ct. App. 2008) (court cites numerous cases from other jurisdictions holding *corpus delicti* rule does not apply to in-court testimony).

801.d.2.A.067 In order for the state to establish the *corpus delicti* of the crime, the state does not have to produce the body of the victim.

State v. Hall, 204 Ariz. 442, 65 P.3d 90, ¶ 48 (2003) (even though state never found body of victim, state presented evidence victim was missing and circumstantial evidence that victim met with foul play, and evidence of others using victim's property was sufficient for jurors to conclude victim was dead and that death resulted from criminal conduct; court noted only Texas requires production of body of victim, and court stated it declines to adopt that rule).

801.d.2.A.069 In order for the state to establish the *corpus delicti* of the crime, the state does not have to prove the cause of death.

State v. Morris, 215 Ariz. 324, 160 P.3d 203, ¶¶ 33–36 (2007) (evidence showed following: bodies were found naked in alley; drag marks indicated they had been moved to alley; DNA on clothing in defendant's camper matched DNA of bodies; one body had defendant's DNA under her fingernails; hair extensions found in defendant's camper were similar to hair extensions of one body; and defendant possessed identification cards from one body when arrested; defendant contended evidence did not establish *corpus delicti* because medical examiners believed both deaths resulted from drug overdoses; court held state did not have to prove cause of death).

801.d.2.A.070 The state need not prove the *corpus delicti* beyond a reasonable doubt; all the state need do is present facts that would allow a reasonable inference of the *corpus delicti.*

State v. Morris, 215 Ariz. 324, 160 P.3d 203, ¶¶ 33–35 (2007) (court held following evidence established *corpus delicti*: bodies were found naked in alley; drag marks indicated they had been moved to alley; DNA on clothing in defendant's camper matched DNA of bodies; one body had defendant's DNA under her fingernails; hair extensions found in defendant's camper were similar to hair extensions of one body; and defendant possessed identification cards from one body when arrested).

State v. Gerlaugh, 134 Ariz. 164, 170, 654 P.2d 800, 806 (1982) (noted *corpus delicti* need not be proved beyond reasonable doubt; condition and location of victim's body corroborated defendant's statement).

State v. Sarullo, 219 Ariz. 431, 199 P.3d 686, ¶¶ 6–10 (Ct. App. 2008) (defendant was victim's ex-boyfriend; victim kept gun unloaded on closet shelf; on 8/25, victim awoke at night and saw defendant standing in her bedroom; defendant walked over to victim, pointed gun at her, and threatened her; after defendant put down gun and left, victim saw it was her gun and it was loaded; after being arrested, defendant told police he had entered victim's home 8/24 and took gun; defendant contended there was no *corpus delicti* for burglary and theft for entering and taking gun on 8/24; court stated that, although there was no evidence, apart from defendant's confession, of 8/24 burglary and theft, there was uncontradicted evidence of 8/25 burglary and aggravated assault, thus there was independent evidence of "closely related" crimes; moreover, defendant had told victim that he had entered her home 8/24 and had taken her gun, and gun was unloaded when taken and loaded when recovered; court concluded defendant's confession was sufficiently corroborated and that evidence supported reasonable inference he committed 8/24 offenses).

State v. Barragan-Sierra, 219 Ariz. 276, 196 P.3d 879, ¶ 12 (Ct. App. 2008) (defendant was convicted of conspiracy to commit human smuggling; court stated "evidence offered to support the inference need not even be admissible at trial"; court held following evidence supported reasonable inference that defendant committed offense: (1) when officers tried to stop truck, it sped off reaching speeds in excess of 100 mph; (2) once truck stopped, driver and three other persons fled into nearby cornfield and were not found; (3) defendant was found with four other persons hiding under piece of carpet in bed of truck; (4) defendant appeared tired and his clothes were soiled; and (5) federal documents showed defendant was not in country legally).

State v. Alatorre, 191 Ariz. 208, 953 P.2d 1261, ¶ 14 (Ct. App. 1998) (victim's statement "and they licked me and stuff" was sufficient to allow admission of defendant's statement that he "licked [the victim] between the legs").

801.d.2.A.080 The state need only show that a certain offense has occurred; the state need not present independent evidence that raises the offense to a higher degree.

State v. Flores, 202 Ariz. 221, 42 P.3d 1186, ¶¶ 8–11 (Ct. App. 2002) (defendant was found with two small rocks of crack cocaine, and when questioned, told officers he was holding drugs for third person who would tell him to whom to deliver the drugs; state charged defendant with possession for sale; state contended possession for sale was merely higher degree of possession, but court disagree and held possession for sale was quantitatively different from possession; because only evidence of sale was defendant's statement, there was no *corpus delicti* for crime of possession for sale, thus trial court properly suppressed defendant's statement).

801.d.2.A.085 If a defendant confesses to several closely related events, the corroborating evidence does not have to support each of the charged offenses as long as the corroborating evidence supports some of them.

State v. Sarullo, 219 Ariz. 431, 199 P.3d 686, ¶¶ 6–10 (Ct. App. 2008) (defendant was victim's ex-boyfriend; victim kept gun unloaded on closet shelf; on 8/25, victim awoke at night and saw defendant standing in her bedroom; defendant walked over to victim, pointed gun at her, and threatened her; after defendant put down gun and left, victim saw it was her gun and it was loaded; after being arrested, defendant told police he had entered victim's home 8/24 and took gun; defendant contended there was no *corpus delicti* for burglary and theft for entering and taking gun on 8/24; court stated that, although there was no evidence, apart from defendant's confession, of 8/24 burglary and theft, there was uncontradicted evidence of 8/25 burglary and aggravated assault, thus there was independent evidence of "closely related" crimes; moreover, defendant had told victim that he had entered her home 8/24 and had taken her gun, and gun was unloaded when taken and loaded when recovered; court concluded defendant's confession was sufficiently corroborated and that evidence supported reasonable inference he committed 8/24 offenses).

State v. Morgan, 204 Ariz. 166, 61 P.3d 460, ¶¶ 17–23 (Ct. App. 2002) (defendant was charged with two counts of sexual conduct with minor based on oral sexual conduct, one count of child molestation for touching victim's genitals with his hand, and one count of sexual assault for engaging in sexual intercourse with victim without her consent; defendant confessed that he engaged in oral sexual contact with victim; neither victim nor any other witness testified about any oral sexual contact; defendant contended there was no *corpus delicti* for sexual conduct counts; although there was no independent evidence of oral sexual contact, following evidence was presented about other offenses: victim testified that defendant touched her between legs and had forceful sexual intercourse with her, and witness saw defendant and victim in back seat of car, both naked from waist down, and with victim straddling defendant; court held that, even though there was no independent evidence of oral sexual contact, there was evidence to support the other charged offenses, which were closely related, and this supported a reasonable inference the oral sexual conduct had occurred).

801.d.2.A.130 An admission may be written or spoken.

Randall v. Alvardo-Wells, 187 Ariz. 308, 928 P.2d 732 (Ct. App. 1996) (although defendant denied making any statements to witnesses, they testified she made certain statements, thus statements were admissions by a party and not hearsay).

Paragraph (d)(2)(B) — Statements that are not hearsay: Statement adopted by party.

801.d.2.B.010 An out-of-court statement is not hearsay if a party has adopted the statement or indicated that the party believes the statement to be true.

State v. Anderson, 210 Ariz. 327, 111 P.3d 369, ¶¶ 31–36 (2005) (because defendant agreed with and expounded upon statement about premeditation attributed to other person, trial court correctly found that defendant had adopted statement).

Standard Chartered PLC v. Price Waterhouse, 190 Ariz. 6, 945 P.2d 317 (Ct. App. 1996) (because defendant-seller was unable to show who wrote the memorandum or that plaintiff-buyer had adopted it, trial court properly excluded it).

Paragraph (d)(2)(C) — Statements that are not hearsay: Statement by authorized person.

801.d.2.C.030 This section allows for admission of factual statements by agents or employees, and not opinions on the law from a party's counsel.

State v. Fulminante, 193 Ariz. 485, 975 P.2d 75, ¶ 18 (1999) (prosecutor's opinion that, without confession, state's case was insufficient to prove guilt beyond a reasonable doubt was not admissible under this section).

Paragraph (d)(2)(D) — Statements that are not hearsay: Statement by party's agent.

801.d.2.D.020 A statement by an agent is admissible against a principal if it was (1) made by the principal's agent or servant, (2) made during the existence of the agency relationship, and (3) concerned matters within the scope of the agency or employment.

State ex rel. Ariz. DHS v. Gottsfield (Medrano), 213 Ariz. 583, 146 P.3d 574, ¶ 11 (Ct. App. 2006) (because statements made by petitioner's employees about matters within scope of their employment would be imputed to employer, trial court erred in ordering that respondent's attorney could conduct *ex parte* interviews with petitioner's employees).

Henry v. Healthpartners of Southern Arizona, 203 Ariz. 393, 55 P.3d 87, ¶¶ 6–9 (Ct. App. 2002) (medical malpractice action resulting from patient's death from cancer was filed against decedent's doctor, radiologist employed by medical center, and medical center (TMC/HSA); plaintiff settled with doctors and went to trial against TMC/HSA; TMC/HSA named doctors as non-parties at fault; plaintiff's trial strategy was to minimize radiologist's fault in order to place more of blame on TMC/HSA; court held factual allegations contained in complaint delineating radiologist's negligence were made by plaintiff's attorney during existence of agency relationship and were within scope of agency, thus they were admissible against plaintiff).

Hernandez v. State, 201 Ariz. 336, 35 P.3d 97, ¶¶ 8–9 (Ct. App. 2001) (plaintiff fell off wall at Patagonia Lake Park; because plaintiff testified there was no trail and that he stepped off retaining wall, notice of claim letter to state from plaintiff's attorney stating plaintiff was walking on trail and stepped off cliff was admissible as prior inconsistent statement), *vacated,* 203 Ariz. 196, 52 P.3d 765 (2002).

801.d.2.D.023 Because a party's disclosure statement prepared by the party's attorney was (1) made by the party's agent, (2) made during the existence of the agency relationship, and (3) concerned matters within the scope of the agency or employment, it is not hearsay and may be offered as affirmative evidence of the truth of the matters asserted.

Ryan v. San Francisco Peaks Truck. Co., 228 Ariz. 42, 262 P.3d 863, ¶¶ 12–17 (Ct. App. 2011) (court held trial court properly ruled plaintiff's disclosure statement was admissible as admission by party-opponent, but further held evidence was not conclusive of nonparty-at-fault, thus plaintiff was properly given opportunity to explain or deny information contained in disclosure statement).

801.d.2.D.025 This section allows for admission of factual statements by agents or employees, and not opinions on the law from a party's counsel.

State v. Fulminante, 193 Ariz. 485, 975 P.2d 75, ¶ 18 (1999) (prosecutor's opinion that, without confession, state's case was insufficient to prove guilt beyond a reasonable doubt was not admissible under this section).

Paragraph (d)(2)(E) — Statements that are not hearsay: Statement by co-conspirator.

801.d.2.E.005 A statement by a co-conspirator is admissible.

State v. Montaño, 204 Ariz. 413, 65 P.3d 61, ¶¶ 67–68 (2003) (court stated that defendant seemed to concede existence of conspiracy, but "unconvincingly argues that there is no evidence linking him to it"; trial court thus did not abuse discretion in allowing witness to testify about conversation he overheard between two other inmates).

State v. Nordstrom, 200 Ariz. 229, 25 P.3d 717, ¶ 55 (2001) (statement of third person to defendant about committing robbery was admissible).

801.d.2.E.050 In order to admit the statement of a co-conspirator, the trial court must find the existence of three factors, the first of which is that a conspiracy existed and both the defendant and the declarant were parties to it.

State v. Dunlap, 187 Ariz. 441, 930 P.2d 518 (Ct. App. 1996) (state contended declarant and defendant were conspiring to cover up their involvement in killing and obstruct investigation and prosecution of case).

801.d.2.E.060 In order to admit the statement of a co-conspirator, the trial court must find the existence of three factors, the second of which is that the co-conspirator made the statement during the course of the conspiracy.

State v. Dunlap, 187 Ariz. 441, 930 P.2d 518 (Ct. App. 1996) (state contended declarant made diary entries while he and defendant were conspiring to cover up their involvement in killing and obstruct investigation and prosecution of case).

801.d.2.E.070 In order to admit the statement of a co-conspirator, the trial court must find the existence of three factors, the third of which is that the co-conspirator made the statement in furtherance of the conspiracy.

State v. Dunlap, 187 Ariz. 441, 930 P.2d 518 (Ct. App. 1996) (because declarant could have used diary entries to formulate plan to cover up involvement in killing and obstruct investigation and prosecution of case, and remind him of things to do to accomplish this, trial court did not abuse discretion in concluding diary entries were in furtherance of conspiracy).

April 10, 2013